

Decision 01-08-062 August 23, 2001

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

In the Matter of Alternative Regulatory  
Frameworks of Local Exchange Carriers.

Investigation 87-11-033  
(Filed November 25, 1987)

**O P I N I O N**

**Summary**

This order grants the petition for modification filed by the Commission's Office of Ratepayer Advocates (ORA) on March 1, 2001, modifies Decision (D.) 01-02-041 accordingly, and clarifies the information request and discovery prerogatives of ORA.

**Background**

By D.00-02-047 the responsibility for undertaking the audit of Pacific Bell Telephone Company (Pacific Bell) as part of monitoring activities under the new regulatory framework (NRF) established by D.89-10-031 was transferred from ORA to the Commission's Telecommunications Division. ORA and The Utility Reform Network (TURN) sought rehearing of D.00-02-04 based on claims of due process denial and the record basis for discussion in that decision of an appearance of bias involving the selected consultants.

In D.01-02-041, the Commission concluded there was no due process denial, but granted rehearing with respect to the issue of the legal adequacy of the record evidence described in D.00-02-047 regarding an appearance of bias. We vacated D.00-02-047 to better reflect the reasons for the transfer of audit responsibility. In addition, in the interest of clarifying ORA's on-going role in

the NRF audit process, language was placed in the rehearing decision stating that ORA's discovery rights when the audit is produced would be as expansive as those of any other party. Specifically the decision stated:

"It is important to note, furthermore, that our transferring of the Pacific Bell audit responsibility to the Telecommunications Division does not mean that ORA no longer has the right to inspect or review Pacific Bell account data or other information. Pursuant to section 309.5, ORA has the duty to represent customer interests in Commission proceedings. Therefore, when the Pacific Bell audit information and results are submitted in the NRF proceedings, ORA shall have discovery rights, as do other parties to the proceeding. It may also rely on Section 309.5(e), which provides:

'The division may compel the production or disclosure of any information it deems necessary to perform its duties from entities regulated by the commission provided that any objections to any request for information shall be decided by the assigned commissioner or by the president of the commission if there is no assigned commissioner.'

"In addition, the transfer of the audit responsibility does not relieve Pacific Bell of its obligation to fully answer any and all data requests received from all Commission staff, and to provide answers on a timely basis." (D.01-02-047, at 5-6.)

On March 1, 2001, ORA filed a petition for modification of D.01-02-047 (Petition) to "modify language so as to resolve what could be construed as an internal inconsistency within the decision, so that ORA's discovery rights in this matter are clearly set forth, consistent with statute." (ORA Petition at 1.) ORA also filed a motion requesting a shortening of time for the filing of responses to the Petition.

On March 5, 2001, Administrative Law Judge Weismehl issued a ruling shortening the time for responses. Timely responses to the ORA petition were filed by Pacific Bell and TURN.

TURN supports the ORA petition and urges the Commission to grant ORA's Petition to ensure there is no confusion as to the discovery rights of ORA.

Pacific Bell objects to the ORA petition and accompanying motion on both procedural and substantive grounds.

Pacific Bell first objects to the motion of ORA requesting a shortening of time to respond to the Petition. Pacific Bell states, correctly, that ORA cited an erroneous provision, Rule 43, as its authority for a petition for modification and that its request for an order shortening time "was not accompanied by any declarations or affidavits establishing any basis for deviating from the Commission's rules." (Pacific Bell's Objections to and Response to the ORA's Petition to Modify D.01-02-041, hereafter Pacific Bell's Response.) Whatever the source for the citation error, it does not represent a substantive failure since the rules concerning the filing of a petition for modification, as contained in Rule 47, were complied with in the ORA Petition filing.

Rule 47(f) states:

"Responses to petitions for modification must be filed and served within 30 days of the date that the petition was served, unless the administrative law judge sets a different date."

In this specific situation, ORA requested the shortening of time by a separate motion (as required by Rule 2.1). Our rules with regard to motion practice provide that "[n]othing in this rule prevents the Commission or the administrative law judge from ruling on a motion before responses or replies are filed." (Rule 45 (h).) In spite of the unfortunate amount of time that has elapsed

in bringing the audit we ordered in June 1994, seven years ago, to completion, the Commission does not wish to have any further delays surrounding this audit or any other activity related to it. The Administrative Law Judge was correct in considering this matter of importance and granting the motion shortening time without waiting for responses.

Pacific Bell also objects to the substance of the ORA Petition, contending ORA is attempting to create an ambiguity where none exists. Pacific Bell contends § 309.5 directs ORA to carry out its customer representation role in “proceedings” and, seemingly, not before such proceedings are initiated. (Pacific Bell Response at 3-5.) Pacific Bell also contends that ORA is endeavoring to conduct a second audit, contrary to the Commission’s intent in transferring the audit responsibility to the Telecommunications Division. (Id. at 5.)

## **Discussion**

With regard to the substantive concerns raised by Pacific Bell, its own objection to the relief requested by ORA demonstrates that the clarification sought by ORA is necessary. Pacific Bell focuses on the Commission’s reassignment in D.00-02-047 of the Pacific Bell audit responsibility from ORA to the Telecommunications Division and Pacific Bell’s belief that with such a reassignment ORA has no role relative to the audit nor authority to seek related information from Pacific Bell until the audit is completed and presented in a formal Commission proceeding. Pacific Bell states:

“In examining this paragraph [in D.01-02-041 complained of by ORA], there is no inconsistency. First, Pacific is not challenging ORA’s overall responsibility to represent consumers or to obtain information in performing its duties. What is at issue in this matter is not ORA’s general responsibilities, but the degree and extent to which it can or should participate in the audit. In this regard the Decision was, once again, clear and unequivocal. The decision

specifically tells ORA when it can participate in the audit: ‘...when the Pacific Bell audit information and results are submitted in the NRF proceeding. It then tells ORA how it can participate in the audit: ORA shall have discovery rights as do other parties in the proceeding.’ ...

The Commission’s articulation in the Decision is, moreover, consistent with ORA’s duties and responsibilities as defined in section 309.5. ORA is the division created to represent customers ‘in commission proceedings’ (Pub. Util. Code §309.5(a)), the Commission is directed to provide resources to ORA to participate ‘in all significant proceedings’ (§ 309.5(c)), and the Commission is directed to ensure against conflicts of ORA ‘on a particular case or proceeding... § 309.5(d). The decision [D.00-02-041] recognizes that ORA’s ‘duty’ under section 309.5 is ‘to represent consumer interests in Commission proceedings.’ Decision p. 5. Clearly, the Commission’s use of that term was deliberate – the Decision says when and how ORA can participate in the next NRF proceeding. Nothing in the Decision precludes ORA’s participation in the NRF proceeding, through discovery, once the audit has been submitted.” (Pacific Bell Response at 3-5.)

It is precisely this inferred limitation on ORA’s information seeking authority to which ORA objects and for which it seeks modification.

In discussing ORA’s participation in the proceeding that will ultimately review the tendered audit report (expected to be the up-coming triennial NRF review), the Commission may have allowed an inference to be made that ORA’s on-going broad discovery rights, as both a statutory organization and a unit of the Commission’s staff, were diminished in some fashion and did not commence until the audit was completed and became the subject of review in a formal proceeding. Such an inference would be erroneous, clearly at odds with both our language and our intent, and at odds with the plain language of applicable statutes. While we do not believe such an inference is reasonable, it is being

asserted by Pacific Bell, and clarification of our decision to dispel this unreasonable inference is appropriate.

Pacific Bell is correct that we do not seek two formal audits of Pacific Bell. We have given the formal audit responsibility to the Telecommunications Division. That does not, however, serve to limit the authority for ORA to obtain all information necessary to carry out its responsibilities as a unit of the Commission's staff and as the organization designated with the responsibilities set out in § 309.5. The fact that ORA may seek information comparable (or even identical) to that sought by the Telecommunications Division in carrying out the audit we have directed, is not inappropriate; indeed it is consistent with ORA's statutory independence to pursue discovery as ORA deems fit.

ORA's scope of authority to request and obtain information from entities regulated by the Commission is as broad as that of any other units of our staff, including the offices of the Commissioners. It is constrained solely by a statutory provision that provides a mechanism unique to ORA for addressing discovery disputes.

ORA's rights to seek information from entities regulated by this Commission, including Pacific Bell, principally arise from two statutes – Pub. Util. Code. §§ 314 and 309.5.

Pub. Util. Code §314 states that, among others:

“...and each officer and person employed by the commission may, at any time, inspect the accounts, books, papers, and documents of any public utility. (§ 314 (a), emphasis added.)

This applies also to:

“...any business which is a subsidiary or affiliate of, or a corporation which holds a controlling interest in, an electrical gas or telephone

corporation with respect to any transaction between the electrical, gas, or telephone corporation and the subsidiary, affiliate, or holding corporation on any matter that might adversely affect the interests of the ratepayers of the electrical, gas or telephone corporation. (§ 314(b).)

This provision makes no reference to the need for a proceeding to exist, but is intended to provide access for our staff, including ORA, to undertake audits or investigations, obtain information, and ask questions at any time and for any purpose related to their scope of work on behalf of the Commission and the people of the State of California. By historical evolution, the statutory right to inspect the “accounts, books, papers, and documents” has come to include the right to propound data requests by which the holders of these accounts, books, papers, and documents can be compelled to search for and provide these materials or analyze them in some fashion. In fact, it is for mutual convenience that data requests are utilized. The statutory authority allows staff acting within the scope of their Commission responsibilities to arrive at a utility unannounced to undertake such an inspection of records.

Pub. Util. Code § 309.5 was added in 1996. (Ch. 856, Stats. 1996.) It did several things relative to ORA. It transformed the staff unit already charged by Commission directive with representing the long-term interests of customers (Resolution of the Commission dated July 6, 1984, creating the Public Staff Division) from a line staff reporting to the Executive Director to a statutorily mandated unit with a separate budget and a director appointed by the Governor. With respect to access to information from regulated entities it made no changes in the scope of ORA access authority but did add a procedure for resolving disputes over access when they arose. Specifically it states:

“The division [designated as ORA] may compel the production or disclosure of any information it deems necessary to perform its duties from entities regulated by the commission provided that any objections to any request for information shall be decided by the assigned commissioner or by the president of the commission if there is no assigned commissioner.” (§ 309.5 (e).)

While the role of ORA is to “represent the interests of public utility customers and subscribers in commission proceedings” (§ 309.5 (a)), its authority to seek out “any information it deems necessary to perform its duties” is not limited to the existence or timing of a “proceeding”. It was not our intent to constrain ORA’s authority in this fashion and, being both the entity described in § 309.5 and employees of the Commission as referred to in § 314, we would not do so. If Pacific Bell or any other regulated entity has objection to a specific request for information from our staff, procedures exist for addressing such objections.

### **Need for a Hearing**

Pacific Bell has requested that in the event any modification to D.01-02-041 may occur, we hold a hearing pursuant to Pub. Util. Code § 1708.

While we will modify the order text to clarify ORA’s authority to seek information from entities under the jurisdiction of this Commission, we are not modifying the principal direction of D.01-02-041, i.e., that the Telecommunications Division and not ORA will be responsible for the designated audit of Pacific Bell directed in D.94-06-011 and subsequent decisions. What we are doing is ensuring that the plain meaning of applicable statutes is clearly understood. There are no factual issues to resolve in addressing the meaning of these statutes on which the opportunity for hearing would shed any light. Therefore, no hearing pursuant to § 1708 need be provided.



## Conclusion

For the reasons discussed in the body of this decision, D.01-02-041 should be modified by revising the language on pages 5 and 6 of the printed version of the decision as follows:

“The Commission has decided, therefore, that it would be more efficient and a better deployment of resources to have the Telecommunications Division oversee the Pacific Bell audit that is to be submitted in the next NRF review proceeding. We shall, accordingly, vacate D.00-02-047, but we shall also affirm our order transferring oversight of the audit from ORA to the Telecommunications Division. The present decision shall serve to issue the order as well as respond to ORA’s and TURN’s joint application for rehearing.

It is important to note, furthermore, that our transferring of the Pacific Bell audit responsibility to the Telecommunications Division does not mean that ORA no longer has the right to inspect or review Pacific Bell account data or other information. Pursuant to Section 314, “...each officer and person employed by the commission may, at any time, inspect the accounts, books, papers and documents of any public utility. Section 314(b) makes this applicable to affiliates or holding companies of any public utility with respect to transactions between the affiliates, holding company and the utility that might adversely affect the interests of the ratepayers of the utility. ORA staff members remain fully employees of the Commission. Additionally, pursuant to Section 309.5, ORA has the duty to represent customer interests in Commission proceedings. Therefore, when the Pacific Bell audit information and results are submitted in the NRF proceeding, ~~ORA shall have discovery rights, as do other parties to the proceeding.~~ It may also rely on Section 309.5(e), which provides:

“The division may compel the production or disclosure of any information it deems necessary to perform its duties from entities regulated by the commission provided that any objections to any request for information shall be decided by the assigned commissioner or by the president of the commission if there is no assigned commissioner.”

Thus, ~~In addition,~~ the transfer of the audit responsibility does not relieve Pacific Bell of its obligation to fully answer any and all data requests

received from all Commission staff, and to provide answers on a timely basis.”

### **Comments on Draft Decision**

The draft decision of ALJ Weismehl in this matter was mailed to the parties in accordance with Section 311(g)(1) of the Public Utilities Code and Rule 77.7 of the Rules of Practice and Procedure. Comments from Pacific Bell and jointly from ORA and TURN were filed on July 2, 2001, and reply comments were filed by ORA and TURN on July 9, 2001. The comments were carefully considered but do not require any changes to the decision.

### **Findings of Fact**

1. ORA’s erroneous reference to Rule 43 rather than Rule 47, the current rule governing petitions for modification, does not represent a substantive failure since the rules concerning the filing of a petition for modification, as contained in Rule 47, were complied with in the ORA Petition filing.

2. The Commission may have allowed an erroneous inference to be made that ORA’s on-going broad discovery rights, as both a statutory organization and a unit of the Commission’s staff, were diminished in some fashion and did not commence until the audit was completed and became the subject of review in a formal proceeding.

3. The Commission does not seek to have two formal audits of Pacific Bell; the formal audit responsibility has been given to the Telecommunications Division.

4. ORA is a unit of the Commission staff.

5. ORA staff members are Commission staff members as that term is used in § 314.

6. ORA is the unit of the Commission staff designated in § 309.5 to represent customer interests in Commission proceedings.

7. Procedures exist to address any challenges to information requests made to public utilities by the Commission staff in general or ORA in particular.

### **Conclusions of Law**

1. Rule 45(h) permits the Commission or an administrative law judge to rule on a motion before responses or replies are filed.

2. The assignment of the formal Pacific Bell audit responsibility to the Telecommunications Division does not serve to limit the authority for ORA to obtain all information necessary to carry out its responsibilities as a unit of the Commission's staff and as the organization designated with the responsibilities set out in § 309.5.

3. ORA's rights to obtain information from utilities pursuant to §§ 314 and 309.5 do not require the existence of a related proceeding and may be exercised at any time for any purpose related to its scope of work.

4. No hearing should be required pursuant to § 1708 since the matters determined are all matters of law on which the parties have had an adequate opportunity to present their positions.

5. D.01-02-041 should be modified as described in this decision.

### **O R D E R**

#### **IT IS ORDERED** that:

1. The Petition for Modification filed by the Commission's Office of Ratepayer Advocates on March 1, 2001 is granted and the language in Decision 01-02-041 is changed at pages 5 and 6 of the printed version of the decision as

follows, with underscoring indicating additions and strikeout indicating deletions:

“The Commission has decided, therefore, that it would be more efficient and a better deployment of resources to have the Telecommunications Division oversee the Pacific Bell audit that is to be submitted in the next NRF review proceeding. We shall, accordingly, vacate D.00-02-047, but we shall also affirm our order transferring oversight of the audit from ORA to the Telecommunications Division. The present decision shall serve to issue the order as well as respond to ORA’s and TURN’s joint application for rehearing.

“It is important to note, furthermore, that our transferring of the Pacific Bell audit responsibility to the Telecommunications Division does not mean that ORA no longer has the right to inspect or review Pacific Bell account data or other information. Pursuant to Section 314, “...each officer and person employed by the commission may, at any time, inspect the accounts, books, papers and documents of any public utility. Section 314(b) makes this applicable to affiliates or holding companies of any public utility with respect to transactions between the affiliates, holding company and the utility that might adversely affect the interests of the ratepayers of the utility. ORA staff members remain fully employees of the Commission. Additionally, pursuant to Section 309.5, ORA has the duty to represent customer interests in Commission proceedings. ~~Therefore, when the Pacific Bell audit information and results are submitted in the NRF proceeding, ORA shall have discovery rights, as do other parties to the proceeding. It may also rely on Section 309.5(e), which provides:~~

“The division may compel the production or disclosure of any information it deems necessary to perform its duties from entities regulated by the commission provided that any objections to any request for information shall be decided by the assigned commissioner or by the president of the commission if there is no assigned commissioner.”

“Thus, ~~In addition,~~ the transfer of the audit responsibility does not relieve Pacific Bell of its obligation to fully answer any and all data requests received from all Commission staff, and to provide answers on a timely basis.”

2. This proceeding is closed.

This order is effective today.

Dated August 23, 2001, at San Francisco, California.

LORETTA M. LYNCH  
President  
RICHARD A. BILAS  
CARL W. WOOD  
GEOFFREY F. BROWN  
Commissioners

I will file a dissent.

/s/ HENRY M. DUQUE  
Commissioner

I.87-11-033

D.01-08-062

Commissioner Henry M. Duque, dissenting:

Our decision today resolves a Petition to Modify filed by the Office of Ratepayer Advocates (ORA). The Petition concerns an audit of Pacific Bell for our review of the New Regulatory Framework. Among other things, ORA requests that language be deleted to clarify its discovery rights here and in other proceedings. A clarification is also requested which orders Pacific Bell as well as other utilities to provide ORA “any documents or records. . . at any time.”

I fully support the right of ORA to zealously represent the interests of ratepayers through discovery. I agree with the majority that the language should be deleted. The language is dicta. It is not essential to the decision and does not serve to amend, alter or rescind any previous decision. In fact, ORA’s right to discovery was not even at issue in the earlier decision.

The majority then goes on to state that ORA’s right to discovery “is as broad as that of any other staff, including the offices of the Commissioners.” For two reasons, I believe that we should not go any further than to remove the language and am therefore dissenting. First, the proposed modification affects all utilities and not just Pacific Bell or the parties herein. This proceeding does not provide other interested parties with notice and opportunity to comment on the proposed modification.

Second, the unique circumstances here do not lend themselves to making broad, generalized statements applicable to all Commission proceedings. The Commission issued an order governing the audit scope. That order necessarily determines what records or documents requested by ORA fall within the audit scope. The Commission should not, in effect, pre-judge a motion to compel without knowing if the records sought by ORA fall within the audit scope.

Our Telecommunications Division is complying with the audit scope order in managing the audit. Like the Telecommunications Division, ORA must comply with the audit scope order. I see no reason to provide ORA a blanket exemption from the audit scope order. To do so would defeat the very purpose behind the Commission transferring the audit oversight from ORA to the Telecommunications Division. The majority even agrees that the Commission ordered one audit by the Telecommunications Division, not a second ORA audit.

/s/ HENRY M. DUQUE

Henry M. Duque  
Commissioner

August 23, 2001

San Francisco, California